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No. 98-1163

In the Supreme Court of the United States

OCTOBER TERM, 1998

MIRON FLORIN MARCU, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
HUGH MULLANE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

24pp

QUESTION PRESENTED

Whether substantial evidence supported the Board of Immigration Appeals' denial of asylum, which was based in part on the State Department's advisory opinion that a significant change in country conditions made petitioner's fear of persecution no longer well-founded.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 147 F.3d 1078. The decision and order of the Board of Immigration Appeals (Pet. App. 25a-32a), and the decision and order of the immigration judge (Pet. App. 33a-38a) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 26, 1998. No petition for rehearing or suggestion for rehearing en banc was filed by petitioner. On August 13, 1998—after the time for filing a petition for rehearing or suggestion for rehearing en banc had elapsed (Fed. R. App. P. 35(c), 40(a)(1))—the court *sua sponte* directed the parties to file briefs addressing whether the case should be reheard en banc. Pet. App. 39a. Peti-

tioner filed a Brief in Support of Rehearing En Banc, but did not file a separate petition for rehearing, nor did the brief seek panel rehearing. The court of appeals denied the suggestion for rehearing en banc on October 22, 1998. Pet. App. 40a. The petition for a writ of certiorari was filed on January 19, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). For the reasons stated in Point 1, *infra*, we believe that the Court lacks jurisdiction because the petition was not timely filed.

STATEMENT

1. The Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C 1158(a). The decision to grant or deny asylum, however, falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a).[1]

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[1] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI-A, 110 Stat. 3009-690, significantly revised the Immigration and Nationality Act's asylum provision. That amendment, however, does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA, Tit. VI-A, § 604(c), 110 Stat. 3009-694; see also Pet. App. 1a-2a. The changes in asylum worked by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-C, § 421(a), 110 Stat. 1270, do apply to this case because the

An alien seeking asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite well-founded fear of persecution. 8 C.F.R. 208.13(a) (1994); see also 8 C.F.R. 208.13(a) (1996). A showing of past persecution gives rise to a presumption of refugee status. 8 C.F.R. 208.13(b)(1) (1994); see also 8 C.F.R. 208.13(b)(1) (1996). That presumption can be rebutted, however, if it is shown, by a preponderance of the evidence, that "since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return." 8 C.F.R. 208.13(b)(1)(i) (1994).[2]

2. Petitioner is a native and citizen of Romania. Petitioner's mother was a United States citizen who moved to Romania as a teenager; his father was Roma-

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AEDPA amendment governs asylum determinations made on or after the amendment's effective date of April 24, 1996. AEDPA, Tit. IV-C, § 421(b), 110 Stat. 1270. For purposes of petitioner's claim, however, the AEDPA amendment to asylum does not differ in any material way from the pre-AEDPA asylum provision.

[2] That regulation provides in full:

> If it is determined that the applicant has established past persecution, he or she shall be presumed also to have a well-founded fear of persecution unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant's country of nationality or last habitual residence have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he were to return.

The text of the 1996 version of the regulation is identical. 8 C.F.R. 208.13(b)(1)(i) (1996).

nian. Pet. App. 2a, 34a.[3] When a communist regime came to power in 1945, most of the family's possessions were confiscated, but they were allowed to remain in their home, which was the largest house in the town at that time. *Id.* at 2a, 37a. The family leased the home as an office to the United States Department of State. *Id.* at 2a, 26a.

After the United States closed its office, the government forced petitioner's family to live in "a small room, 10 feet by 12 feet, with no facilities, no water, no anything, only a room." Pet. App. 2a. During his youth, petitioner's mother was imprisoned for refusing to renounce her United States citizenship, and petitioner experienced some taunting at school. *Ibid.* He claimed that his mother's citizenship prevented him from attending a college, although he was admitted to a technical trade school. *Ibid.* He was sufficiently well off that he was able to purchase an expensive home and to decorate it with some valuables. *Id.* at 37a.

Petitioner testified that he was arrested and beaten in 1964 for listening to Radio Free Europe and in 1968 for wearing blue jeans made in the United States. *Id.* at 2a. He also complained that, throughout the 1970s and 1980s, the government repeatedly searched his home and questioned him, and refused to permit him to visit his first wife after she emigrated to the United States. *Id.* at 2a-3a. Finally, in June 1990, after he applied for a visa to visit the United States, petitioner was summoned to the police station and beaten unconscious, while officers threatened to kill him for being an "enemy of the people." *Id.* at 3a, 37a.

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[3] Because petitioner's mother left the United States at a young age, she did not pass her citizenship on to petitioner. See Pet. App. 34a; Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139.

In September 1990, petitioner left Romania for the United States with his second wife. Pet. App. 3a, 27a. His mother-in-law, who lives in his Romanian home, testified that within a few weeks of his departure, the local police came to the home seeking information about him. *Id.* at 3a.

3. a. In September 1990, petitioner entered the United States as a nonimmigrant visitor, but he did not timely depart. Pet. App. 25a. In November 1992, the Immigration and Naturalization Service (Service) commenced deportation proceedings against petitioner. *Id.* at 33a; see also 8 U.S.C. 1251(a)(1)(B). Petitioner conceded deportability, but sought asylum and withholding of deportation based on the persecution he claimed to have suffered at the hands of the Romanian government. Pet. App. 2a, 3a. Pursuant to regulation, 8 C.F.R. 208.11, the immigration judge forwarded petitioner's asylum application to the Department of State for an advisory opinion. Pet. App. 33a.

The State Department responded with a letter from Roger Dankert, Director, Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs, and a report on country conditions in Romania. Pet. App. 41a-48a. In the letter, Director Dankert observed that information indicating that petitioner received a good education and long-term employment and that his first wife was permitted to travel to the United States "d[id] not comport with the applicant's depiction of himself as a constant target of official harassment, for they would not have been possible for someone in serious troubles with the authorities." *Id.* at 42a. The Director acknowledged that "[t]he applicant's connections with the United States may well have led to recurrent interest in him on the part of [Communist] authorities." *Id.* at 41a. But, the Director continued, there had been "real

change in the Romanian Government" with the downfall of the Ceausescu regime so that petitioner was "incorrect in stating that his U.S. connections would be a basis for retribution against him." *Id.* at 42a. The Director concluded that "[w]e see no reason why the applicant could not reside tranquilly in Romania." *Ibid.* The Director noted that his observations were based on the State Department's analysis of "country conditions and other relevant factors," and also on "an evaluation of the specific information provided in the application."[4]

The country-conditions report that accompanied the letter summarized the recent political changes in Romania since the overthrow of the Ceausescu regime in late 1989. Pet. App. 44a. The report explained that "[c]hanges in Romania have been fundamental," such that the country has been "profoundly transformed" and has made "solid progress in human rights." *Ibid.* The report also noted that a weak economy has caused Romanians "to seek economic opportunity and a better life in Western Europe or North America." *Ibid.* The report concluded that "country conditions have so altered as to remove any presumption that past mistreatment under Ceausescu or in the chaotic first year after his overthrow will lead to mistreatment in the future." *Id.* at 45a.

b. Following a hearing, the immigration judge concluded that petitioner had not established a well-founded fear of future persecution. Pet. App. 37a. She noted at the outset that the State Department report was "not dispositive since it is this Court's responsibil-

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[4] The letter also noted that the State Department had no "independent information" about petitioner from its own sources, and thus relied on the personal information provided in petitioner's application. Pet. App. 42a.

ity to determine eligibility." *Id.* at 33a. The immigration judge then determined that, "[b]ased on the documentation submitted and the testimony," she could not "on this record find that the stringent test that Congress has said that has to be met, has been met, as to persecution." *Id.* at 37a. She also found it "highly peculiar" that petitioner's mother-in-law was able to travel freely to the United States and that she was returning to Romania. *Ibid.*

c. The Board of Immigration Appeals affirmed. Pet. App. 32a. The Board acknowledged that the physical beatings petitioner claimed to have endured "might rise to the level of [past] persecution." *Id.* at 29a. The Board nevertheless concluded that petitioner "failed to establish that he maintains a well-founded fear of persecution," *ibid.*, because "[a] preponderance of evidence in the record of proceedings indicates that conditions have changed dramatically in Romania since the respondent's departure," *id.* at 31a. The Board placed significant weight on the State Department's analysis of petitioner's claim and its recommendation regarding the likelihood of future persecution given the change in government. *Ibid.* The Board also determined that the persecution petitioner previously suffered was not sufficiently severe to merit a grant of asylum on humanitarian grounds. *Id.* at 31a-32a. Finally, the Board concluded that, because petitioner "failed to satisfy the lower burden of proof required for asylum, it follows that he has failed to satisfy the clear probability standard of eligibility required for withholding." *Id.* at 32a.

4. The court of appeals denied the petition for review. Pet. App. 9a. The court considered the only question before it to be "whether there is substantial evidence in the record to support the [Board's] conclu-

sion that the [Service] successfully rebutted the presumption of future persecution." *Id.* at 5a.[5] The court approved the Board's significant reliance on the State Department's advisory letter and country conditions report, noting that "[w]e have previously described these country reports as '"the most appropriate and perhaps the best resource" for "information on political situations in foreign nations."'" *Ibid.* (quoting *Kazlauskas* v. *INS*, 46 F.3d 902, 906 (9th Cir. 1995), and *Rojas* v. *INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991) (per curiam)).

The court of appeals concluded that (1) the State Department report, (2) Director Dankert's analysis, which "was individualized to [petitioner's] situation," Pet. App. 6a, and (3) the absence of "alleged abuses [by petitioner] after that ['chaotic first year'], which is completely consistent with the Department of State report", *ibid.*, together "provided substantial evidence for the [Board's] determination that the [Service] successfully rebutted the presumption of future persecution." *Id.* at 7a. The fact that "the documentary evidence [petitioner] submitted in some ways confirms the country report's observation that the conditions in Romania have changed" reinforced the court's conclusion. *Ibid.* In short, the court of appeals perceived that the case reduced to "a factual dispute regarding the current conditions in Romania," and discerned that its "task is to determine whether there is substantial evidence to support the [Board's] finding, not to

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[5] Like the Board, the court of appeals assumed that petitioner had shown that he suffered past persecution. Pet. App. 5a.

substitute an analysis of which side in the factual dispute we find more persuasive." *Ibid.*[6]

Judge Hawkins dissented. Pet. App. 9a-24a. Although he agreed "with the majority that the issue is whether there is substantial evidence in the record to support the [Board's] conclusion," *id.* at 15a, he concluded that the record as a whole failed sufficiently to rebut the presumption of a well-founded fear of persecution. *Id.* at 17a. The dissent also criticized the Board for failing to address petitioner's claim that the local authorities would persecute him upon his return. *Id.* at 23a.

ARGUMENT

1. Review should be denied because the petition appears to be untimely. Pursuant to 28 U.S.C. 2101(c), a petition for a writ of certiorari in a civil case must be filed within 90 days after entry of a court of appeals' judgment. This time limitation is "mandatory and jurisdictional." *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990). The court of appeals entered its judgment on June 26, 1998. The petitioner did not file a petition for rehearing, nor did he seek an extension of time from this Court in which to file a petition for a writ of certiorari. Accordingly, the petition was due on September 24, 1998. The petition was not filed, however, until January 19, 1999.

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[6] The court of appeals also affirmed the Board's decision to deny petitioner asylum for humanitarian reasons and to deny withholding of deportation. Pet. App. 8a-9a. Petitioner has not sought this Court's review of either of those aspects of the court of appeals' judgment. The Question Presented and the text of the petition address only the Service's asylum decision and application of an asylum regulation. (A separate regulation governs the burden of proof in withholding of deportation cases. See 8 C.F.R. 208.16(b)(2).)

Petitioner contends (Pet. 1-2) that the court of appeals' *sua sponte* call for briefing on whether the case should be heard en banc sufficed to toll the time for filing the petition. That is incorrect. Pursuant to Supreme Court Rule 13.3, a suggestion made to a court of appeals for rehearing en banc does not toll the time for filing a petition for a writ of certiorari. For the same reason, a *sua sponte* call by the court of appeals for briefing on the appropriateness of rehearing en banc should not toll the 90-day filing period. That is especially true when, as in this case, the court's request for briefs is made outside the proper time limit for filing a petition for rehearing or suggestion for rehearing en banc (Fed. R. App. P. 35(c), 40(a)(1)), and no rehearing or rehearing en banc is ultimately granted by the court.

Petitioner claims (Pet. 2) that the order for briefing was treated as both a petition for rehearing and a suggestion for rehearing en banc. But nothing in the Ninth Circuit rules so provided. See 9th Cir. R. 35-1, 40-1 (1998); compare *Jenkins*, 495 U.S. at 50 (noting Fifth and Eleventh Circuits' rules that automatically denominate all suggestions for rehearing en banc as also petitions for panel rehearing).[7] Nor does anything in the court's orders requesting briefing or denying rehearing en banc indicate that the court considered a petition for rehearing also to be pending. The initial order requesting briefing seeks only the parties' positions "on whether the case should be reheard en banc."

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[7] In the absence of a written court rule or well-established circuit law making clear that all suggestions for rehearing en banc will also be considered as petitions for rehearing (petitioner cites no such authority, and we are aware of no such rule or caselaw within the Ninth Circuit), the practice guide on which petitioner relies (Pet. 2) is an insufficient basis for tolling the time period for seeking certiorari.

Pet. App. 39a. Likewise, the order denying the suggestion for rehearing en banc notes only that a judge of the court requested "an en banc vote" and that a majority of the judges of the court "voted against en banc consideration of this case." *Id.* at 40a. There is no order of the court denying a petition for rehearing.

Petitioner also gave no indication that he considered a petition for rehearing to be embraced within his court of appeals' filing. Petitioner's filing in response to the court's order requesting briefing on the propriety of en banc consideration is styled only as a "Brief in Support of Rehearing En Banc." The text of the document advocates only rehearing en banc, Br. 1, 8 ("Reasons Why Rehearing En Banc Should Be Granted"), 9, 17 ("The need for en banc review is therefore both immediate and compelling."), 19, 21, 23, and its conclusion requests only that petitioner's appeal "be reheard en banc," *id.* at 24. Finally, the fact that the court of appeals withheld issuance of its mandate alone is an insufficient basis for inferring, against all the contrary indications, that either the court of appeals or petitioner considered a petition for rehearing to be pending when the time for filing a petition for a writ of certiorari expired. Sup. Ct. R. 13.3 ("The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate."); cf. Fed. R. App. P. 41(d)(1) (providing generally for stay of the mandate until disposition of a timely filed petition for rehearing *or* for rehearing en banc).

Contrary to petitioner's suggestion (Pet. 2 n.1), this case thus stands in sharp contrast to *Jenkins*, where the court by its orders and the petitioner by the characterization of its filing provided concrete evidence that the suggestion for rehearing en banc was also

considered to be a petition for rehearing. Because there is no evidence in the record that petitioner's brief filed in response to a court order constituted a petition for rehearing, the petition should be denied as untimely.

2. a. Petitioner contends (Pet. 9-13) that review of the court of appeals' substantial-evidence determination is necessary to resolve a conflict in the circuits. No such conflict exists. The court's determination that substantial evidence supported the Board's discretionary denial of asylum is consistent with the Seventh Circuit's disposition of the virtually identical claim in *Vaduva* v. *INS*, 131 F.3d 689 (1997). Vaduva, like petitioner, was a Romanian citizen who had been beaten and endured other instances of harassment and interrogation because of his support for pro-democratic forces in the chaotic period following the downfall of Ceausescu. *Id.* at 690. The Seventh Circuit, like the Ninth Circuit, upheld the Board's denial of asylum, which relied heavily on the State Department's advisory opinion and report of country conditions. The court of appeals explained:

> The State Department's report does not necessarily mean that Vaduva loses, but he had better be able to point to a highly credible independent source of expert knowledge if he wants to contradict the . . . Department's evaluation of the likelihood of his being persecuted if he is forced to return home, an evaluation to which courts inevitably give considerable weight.

Id. at 691 (internal quotation marks omitted). Like the Ninth Circuit here, the Seventh Circuit concluded that the applicant's appeal "was not groundless * * * but in the end it fails like others because it cannot overcome

a simple reality: a dramatic change has swept through the Balkan countries, making asylum in this one unnecessary." *Id.* at 692.

b. It is true, as petitioner notes (Pet. 10-12), that the substantial-evidence inquiry has come out differently in some cases where the Service also placed weight upon the State Department's advisory report. But that does not represent a conflict in the circuits on a question of broad legal import. It simply reflects the necessarily individualized, record-based, and context-specific character of substantial-evidence review. The court of appeals here, like the Seventh Circuit in *Vaduva*, did not rule as a matter of law that State Department reports regarding changed country conditions will always suffice to rebut a showing of past persecution. Rather, the Seventh and Ninth Circuits each simply held that, on the record before the court, the individualized analysis in the State Department's advisory letter and the information contained in the country conditions report constituted substantial evidence to rebut the applicant's particular fear of persecution, which in both cases was based on the conduct of now-displaced government officials. See Pet. App. 6a-7a (noting that the State Department's report "was individualized to [petitioner's] situation"); *Vaduva*, 131 F.3d at 690.

The cases upon which petitioner rests his claim of a conflict (Pet. 10-12) do not support him for reasons that were peculiar to those cases. In *Fergiste* v. *INS*, 138 F.3d 14 (1st Cir. 1998), the court, applying substantial evidence review, concluded that a State Department report documenting a change of *government* in Haiti did not provide substantial evidence to defeat the applicant's fear of persecution by *nongovernmental, private forces* who continued to operate after (and, indeed, may have been invigorated by) the change in government.

Id. at 19. Moreover, in *Fergiste*, the court of appeals reversed because, despite the Board's finding that the applicant had been subjected to persecution in the past, the Board failed to presume a well-founded fear of future persecution, as required by the regulation. *Id.* at 18-19. In this case, by contrast, the Board applied the appropriate presumption, but then concluded that the evidence in the record detailing the dramatic change in country conditions adequately rebutted that presumption. Pet. App. 4a-7a.

Likewise, the substantial-evidence rulings in *Gailius* v. *INS*, 147 F.3d 34 (1st Cir. 1998), and *de la Llana-Castellon* v. *INS*, 16 F.3d 1093 (10th Cir. 1994) (both cited at Pet. 11), do not conflict with the court of appeals' decision in this case. Neither case addresses the regulation governing the burden of proof in asylum cases, 8 C.F.R. 208.13(b)(1)(i), or the presumption of a well-founded fear of future persecution that a demonstration of past persecution triggers under that regulation. In *Gailius*, the court remanded the Board's denial of asylum because the immigration judge failed to rule on the credibility and authenticity of the alien's persecution claim. 147 F.3d at 47. Further, unlike petitioner, the applicant in *Gailius* offered a wealth of specific and detailed testimony that was "[u]nlike the vast majority of asylum claimants," *id.* at 45, and that specifically responded (with expert testimony) to the Service's claim of changed conditions by showing that the former Communists who had persecuted him had recently been restored to power. *Id.* at 39, 42-43. In *de la Llana-Castellon*, the court ruled only that the agency's *sua sponte* use of administrative notice, without affording the petitioner any opportunity to rebut the administratively noticed information, violated the alien's right to due process. 16 F.3d at 1098-1100.

That case, like *Fergiste* v. *INS*, *supra*, moreover, involved threats of violence by a nongovernmental group that remained "a force to be reckoned with" despite the change in government. *Id.* at 1097.[8]

3. Petitioner also contends (Pet. 13-18) that the court of appeals' decision merits review because it conflicts with requirements in federal and international law that asylum determinations be based on the alien's individual circumstances. That claim lacks merit for four reasons.

First, the immigration judge, Board, and court of appeals, in fact, each undertook an individualized analysis of whether petitioner's fear of persecution reasonably persisted despite the change in government. See Pet. App. 6a ("Moreover, the Department of State report was individualized to [petitioner's] situation."); *id.* at 31a ("The record of proceedings does not indicate that a person *in the respondent's circumstances* would reasonably fear persecution upon returning to Romania"; noting that mother-in-law has resided peacefully in petitioner's home for three years) (emphasis added); *id.* at 37a (noting petitioner's accomplishments in Romania; considering it "highly peculiar" that "a relative as close as the mother of his wife can come and visit and the authorities know apparently * * * and she has no

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[8] Petitioner's claim (Pet. 11-12) that the court's ruling conflicts with *Bevc* v. *INS*, 47 F.3d 907 (7th Cir. 1995), and *Hamzehi* v. *INS*, 64 F.3d 1240 (8th Cir. 1995), is even further afield. Those cases addressed the initial burden on the alien to prove persecution, not the burden on the government to rebut the presumption of a well-founded fear. *Bevc*, 47 F.3d at 910; *Hamzehi*, 64 F.3d at 1243-1244 ("vagueness, confusion, and inconsistencies permeated the Hamzehis' testimony," so that they failed to establish a "reasonable link between the mistreatments of the past and their claim of a present, well-founded fear of political persecution").

intention of remaining in the United States, but is returning to Rumania [*sic*]"). Thus, the question that petitioner presents for review by this Court—whether a fear of persecution can be rebutted by "generalized changes in country conditions, and without any evidence pertaining to the alien" (Pet. i)—is simply not presented by the record in this case.

Second, while faulting the asserted lack of further individualized analysis, petitioner never actually identifies what additional evidence he believes the government should have introduced to rebut the presumption of persecution. Petitioner demonstrated that any persecution he previously suffered was at the hands of a vehemently anti-Western, Communist government. The Service responded by introducing evidence that the anti-Western Communist government had fallen four years earlier (Pet. App. 42a, 47a); that his United States connections would no longer be "a basis for retribution against him" (*id.* at 42a); that "civil liberties, including freedom of speech, press, assembly, association, religion, and travel are respected" (*id.* at 44a); and that any residual elements of persecution "can be averted by internal relocation or by recourse to the nascent democratic legal structures rather than by recourse to seeking political asylum abroad" (*id.* at 45a-46a). Because of the availability of internal relocation, the fear of persecution solely by local officials that petitioner expresses generally would not establish a well-founded fear of persecution, and thus need not have been specifically rebutted by the Service.[9]

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[9] See, *e.g.*, *In re A-E-M-*, Int. Dec. No. 3338, 1998 WL 99555 (BIA Feb. 20, 1998) (fear of persecution insufficient where it did not "exist throughout that country"); *In re C-A-L-*, Int. Dec. No. 3305, 1997 WL 80985 (BIA Feb. 21, 1997) ("This Board has found

Finally, given that petitioner has persisted in residing illegally in the United States now for nearly the entire decade since the fall of the government he claims persecuted him, it is inconceivable that the Service could or should have uncovered voluminous or detailed personalized evidence regarding how petitioner is likely to be treated by a government under which he has never lived.

Third, contrary to petitioner's argument (Pet. 14), the court of appeals' ruling is consistent with the text of the Service's burden-of-proof regulation, 8 C.F.R. 208.13(b)(1)(i). Because the State Department letter and the immigration judge's, Board's, and court of appeals' rulings considered petitioner's "particular fear of persecution" (Pet. 14), petitioner's only complaint can be that the evidence was not individualized enough to rebut his evidence of past persecution. But the text of the regulation says nothing about whether and to what extent evidence must be tailored to the individual applicant. Nor does it specify what types of evidence are relevant or what probative force will attach to evidence like the State Department's advisory letter and general country conditions report. Rather, the regulation simply requires the Service to show that there has been a substantial and beneficial change in country conditions (so that the alien's fear is no longer

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that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place within a country. He must show that the threat of persecution exists for him country-wide."); 63 Fed. Reg. 31,947 (1998) ("The Board and the Federal courts have long acknowledged the requirement of countrywide persecution as an integral component of the refugee definition, which cannot be met if the applicant reasonably could be expected to seek protection by relocating to another part of the country in question.").

well founded); it does not require a detailed showing regarding the alien's individual circumstances.[10] Given the substantial deference that Congress has accorded the Attorney General in making asylum decisions—making dispositive whether the "Attorney General determines," 8 U.S.C. 1158(a), that an alien has a well-founded fear of persecution—and the broad deference accorded an agency's interpretation of its own regulation, see, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994), petitioner's lengthy discussion (Pet. 14-17) of how he believes the burden of proof and evidentiary principles should have operated simply represents a disagreement with established principles of deference to the administrative agency.

Fourth, petitioner's claim (Pet. 17-18) that the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, requires that a more rigid burden of proof be imposed on the Service is without basis. The Protocol does not impose any requirements on signatory States regarding asylum decisions. See Guy S. Goodwin-Gill, *The Refugee in International Law* 103-105, 107, 119, 121, 225 (1983); United Nations High Comm'r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* Intro. (G) ¶¶ 24-25, at 7 (rev. ed. Jan. 1992); see also *INS* v. *Cardoza-Fonseca*, 480 U.S.

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[10] An alien, of course, is not precluded from offering proof that he has a well-founded fear despite the change in country conditions. See *Gailius*, 147 F.3d at 46. All that a showing of changed country conditions does is remove the administratively created presumption of a well-founded fear of future persecution.

421, 441 (1987) (Protocol language that pertains to asylum "is precatory").[11]

4. Contrary to petitioner's contention (Pet. 18-20), the court of appeals' ruling does not present any question of broad legal importance. Although petitioner now attempts to portray his claim as presenting a legal question regarding the burden of proof, that is not how either petitioner or the court of appeals looked at this case below. There, both petitioner and the court (including the dissenting judge) recognized that the only question in the case was whether substantial evidence in the record rebutted the presumption that petitioner faced "*future* persecution" (Pet. App. 5a n.1) by a government that ceased to exist years earlier. See *id.* at 3a, 7a, 15a-16a; Pet. C.A. Br. 12 (factual basis for denial of asylum should be "reviewed for substantial evidence"), 20-21, 24 (contending that substantial evidence standard not met by proof in this case; no argument that either a legal question regarding the appropriate burden of proof or the general ability of a State Department analysis and report to qualify as substantial evidence was at issue); Pet. C.A. Reply Br. 1, 6 (same). Petitioner's current burden-of-proof arguments appeared for the first time in a brief filed in response to the court of appeals' *sua sponte* call for briefing on the appropriateness of rehearing en banc.

Understood as a substantial evidence case, petitioner's claim is that his arguments and evidence rendered a particular form of proof—the State Department's individualized analysis and country conditions

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[11] Even if the Protocol did regulate asylum decisions, it is not a self-executing treaty. See *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991); *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982).

report—insufficiently probative. That claim, however, presents a quintessential question of substantial evidence, and the task of evaluating whether an agency's decision is supported by substantial evidence belongs "primarily" to the court of appeals. "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That principle should apply with particular force when, as here, both levels of the administrative agency and the court of appeals concurred in their analysis of the record and its application to the governing law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
HUGH MULLANE
Attorneys

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